

1 William M. Audet, SBN 117456
Jason T. Baker, SBN 212380
2 ALEXANDER, HAWES & AUDET, LLP
152 North Third Street, Suite 600
3 San Jose, CA 95112
Telephone: 408.289.1776
4 Facsimile: 408.287.1776

5 Lester L. Levy
Michele Fried Raphael
6 Renee Karalian
WOLF POPPER LLP
7 845 Third Avenue
New York, NY 10022
8 Telephone: 212.759.4600
Facsimile: 212.486.2093

9 Attorneys for Plaintiffs

10
11 David T. Biderman, Bar No. 101577
Judith B. Gitterman, Bar No. 115661
12 M. Christopher Jhang, Bar No. 211463
PERKINS COIE LLP
13 180 Townsend Street, 3rd Floor
San Francisco, California 94107-1909
14 Telephone: 415.344.7000
Facsimile: 415. 244-7050

15 Attorneys for Defendants

16
17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN JOSE DIVISION

20
21 CLRB HANSON INDUSTRIES LLC d/b/a
INDUSTRIAL PRINTING, and HOWARD
22 STERN, on behalf of themselves and all
others similarly situated,

23 Plaintiffs,

24 vs.

25 GOOGLE, INC.,

26 Defendant.

CASE NO: C05-03649 JW

**Joint Case Management Statement
(Including Joint Fed. R. Civ. P. 26(f)
Report, and Proposed Orders, Pursuant
to N.D. L.R. 16-9)**

27 **JOINT CASE MANAGEMENT STATEMENT**
28

JOINT FEDERAL RULE OF CIV. PROC. 26(f) REPORT
(CASE NO: C05 03649)

Doc. 151841

1 The parties to the above-entitled action jointly submit this Case Management Statement and
2 Proposed Orders.

3 **DESCRIPTION OF THE CASE**

4 **1. Brief Description Of The Events Underlying the Action**

5 **A. Plaintiffs' Brief Description of the Case**

6 This class action is brought by Plaintiffs CLRB Hanson Industries, LLC, d/b/a Industrial
7 Printing and Howard Stern on behalf of themselves and similarly situated advertisers against
8 Defendant Google, Inc. ("Google") arising from Google's practice of overbilling persons who pay
9 to have their website listed as a sponsored link on the Google search results page. Pursuant to
10 Google's uniform AdWords Agreement, class members "purchased" key words which are supposed
11 to trigger their ad to appear when someone enters those words in the Google search box. As detailed
12 in the First Amended Complaint (the "FAC"), during the sign-up process for the AdWords
13 Agreement and in the form AdWords Agreement which consists of the AdWords Program Terms (2
14 pages) and 142 pages of "Frequently Asked Questions" ("FAQs," collectively, the "Agreement"
15 and located on Google's website), Google advertised and offered potential advertisers the right to set
16 their own daily advertising budget and to pay no more than that amount for each day that their ad
17 runs. Google further offered and gave advertisers the right to pause their ad and to not be charged
18 for those days that their ad is paused. In contrast to its representations, Google converts the daily
19 budget set by an advertiser into a monthly budget (by multiplying the chosen daily budget by the
20 number of days in a month) and bills the advertiser up to said monthly budget - - regardless of
21 whether the ad was paused. Google overdelivers ads on days they run and exceeds the daily budget
22 on any given day, but does not provide any credit if the cumulative overage in any given month is
23 within the "monthly" budget. For example, if an advertiser sets his/her daily budget at \$100, runs
24 his/her ad only on Mondays, 4 days in a month, and Google overdelivers the ad by 20% on each of
25 the four days the ad runs and charges the advertiser \$480 for the month (\$120 per day), Google will
26 not provide a credit even though it exceeded the advertiser's "daily budget" by \$80, because it
27 deems the charge to be within the "monthly budget" of \$3,000 (\$100 per day times 30 days). As
28 alleged in the FAC, Plaintiffs claim that this conduct constitutes breach of contract, breach of the

1 implied covenant of good faith and fair dealing, a violation of California Business & Professional
2 Code §§ 17200 *et seq.*, a violation of California Business & Professional Code §§ 17500 *et seq.*, and
3 unjust enrichment.

4 **B. Defendant's Brief Description Of The Case**

5 Google's AdWords program ("AdWords") is an advertising program where Google posts
6 advertisers' sponsored ads on Internet search result pages and websites accessed through the Google
7 search engine or on Google's advertising partners' sites, based upon search terms entered by the
8 Internet user. Advertisers sign-up for AdWords on Google's AdWords webpage. During the sign-
9 up process, advertisers agree to the terms and conditions set forth in Google's AdWords Program
10 Terms ("Terms") and acknowledge that terms of the program are further described in the AdWords'
11 Frequently Asked Questions ("FAQs"). Collectively, the Terms and FAQs comprise the advertiser's
12 "Agreement" with Google.

13 Under AdWords, advertisers' ads (sponsored links) appear on a computer user's Internet
14 search page depending upon the search term typed in by the user. The advertiser specifies the search
15 terms (the AdWords or key words) which will trigger the display of the advertisers' ads. An
16 advertiser is only charged when an Internet user clicks on the sponsored link and visits the
17 advertiser's site.

18 The advertiser specifies the cost (the "Cost Per Click" or "CPC") that it is willing to pay. An
19 advertiser's charges are wholly dependent upon the number of Internet users who click on an
20 advertiser's sponsored links ("click throughs"). An advertiser could receive very few click throughs
21 one day, and a large number of click throughs the next. To make sure that an advertiser's ads obtain
22 the maximum available click throughs in a monthly billing period, Google will deliver
23 advertisements in excess of a specified daily budget, so long as the monthly total does not exceed
24 the daily budget times the number of days in the month.

25 Google fully discloses its practice of maximizing an advertiser's potential click throughs per
26 month. The FAQs section of the AdWords program discloses to advertisers:

27 "Though it may sometimes appear that your daily budget is being exceeded,
28 that usually isn't the case. Here's why: Our system works to deliver enough

1 ads to fully satisfy your daily budget over the course of each month. (That is,
2 your daily budget times the total number of days in the month.) Because page
3 views fluctuate from day to day, we may over-deliver ads on a given day to
4 make up for potential shortfalls later in the month. For instance, if you budget
5 US\$100 per day in a 30-day month, you may receive more than US\$100 in
6 clicks on a given day, but the maximum you would pay is US\$3,000 for that
7 month.

8
9 “At the end of the month our system automatically recognizes any charges in
10 excess of your total monthly budget. When this happens, you won’t be billed
11 for those excess charges. Instead, you’ll see an over-delivery credit for those
12 charges on your Advertising Costs page. . .

13
14 “Over time, this system ensures that you maximize your advertising
15 opportunities while protecting you from being billed in excess of your daily
16 budget.”

17
18 Moreover, “daily budget” is a defined term under the AdWords program, which also
19 discloses this practice. The definition reads:

20 “The amount you're willing to spend on a specific AdWords campaign each
21 day.

22
23 “AdWords displays your ad as often as possible while staying within your
24 daily budget. When the budget limit is reached, you ads will typically stop
25 showing for that day.

26
27 “On any single day, the AdWords system may deliver up to 20% more ads
28 than your daily budget calls for. This helps make up for other days in which

1 your daily budget is not reached. However, you'll never be charged more
2 than your average daily budget over the course of a month. For example: if
3 your daily budget is \$10 and the month has 30 days, you might be charged
4 up to \$12 on any single day but your monthly charges will never exceed
5 \$300."

6 Google also fully discloses that advertisers' daily budgets are based on a 30 or 31 day
7 calculation and that advertisers may be charged up to 30 or 31 times their daily budgets in a billing
8 period. The examples provided in the FAQs and "daily budget" definition demonstrate this point.
9 See FAQ ("For instance, if you budget US\$100 per day in a 30-day month, you may receive more
10 than US\$100 in clicks on a given day, but the maximum you would pay is US\$3,000 for that
11 month."); "Daily Budget" definition ("For example: if your daily budget is \$10 and the month has
12 30 days, you might be charged up to \$12 on any single day but your monthly charges will never
13 exceed \$300.").

14 Additionally, the FAQs disclose that "[Google's] system works to deliver enough ads to fully
15 satisfy your daily budget over the course of each month. (That is, your daily budget times the total
16 number of days in the month.") Likewise, the definition of "daily budget" provides that advertisers
17 will "never be charged more than [their] average daily budget over the course of a month."

18 Nowhere in these documents is an exception made for advertisers who have paused their ad
19 campaign. Indeed, the FAQs and the "daily budget" definition all state that monthly bills are based
20 on the number of days in the month.

21 **2. The Principal Factual Issues Which the Parties Dispute:**

22 **Plaintiffs' Position**

23 Plaintiffs contend that there are no substantial factual issues in dispute with respect to
24 liability. Whether Google charges advertisers more than their daily budget on any given day, and
25 whether it holds each advertiser liable up to a monthly budget (daily budget times the number of
26 days in a month) regardless of how many days their ad ran, should be readily determinable, if even
27 in dispute. Similarly, whether Google advertised and offered advertisers the right to set their own
28 daily budget and to not be charged for those days that their ad does not run should be readily

determinable, if even in dispute. Hence, with defendant's cooperation, the parties should be able to expeditiously submit the legal issues to the Court for summary disposition as to liability. Then, if plaintiffs prevail on the summary disposition as to liability, damages can be determined.

Defendant's Position

The principal factual issues disputed by the parties are:

- (1) Whether Google informs advertisers that the AdWords system may exceed what an advertiser's daily budget calls for on any single day in order to make up for other days in which the advertiser's daily budget was not reached and to maximize the advertiser's advertising opportunities.
- (2) Whether Google informs advertisers that advertisers' daily budgets are based on a 30 or 31 day calculation and that advertisers may be charged up to 30 or 31 times their daily budgets in a billing period.
- (3) Whether Google issues overdelivery credits for any charges in excess of an advertiser's total monthly budget.
- (4) Whether the putative class includes members who received overdelivery credits on their billing statements, and those who did not receive this credit.
- (5) Whether the putative class includes members whose claims are barred by the statute of limitations.
- (6) Whether the putative class includes members who advertised under different versions of the AdWords program.
- (7) Whether the putative class includes members who paused their advertising campaigns, and those who did not pause.
- (8) Whether during the sign up process Google "explicitly tells prospective advertisers that they will only be billed [based on the number of] days their ad runs."
- (9) Whether advertisers were charged for periods when their ads were paused.
- (10) Whether Google "converts the daily budgets set by advertisers into monthly budgets."
- (11) Whether the AdWords agreement "expressly distinguishes. . . 'monthly' budgets from an advertiser's 'daily' budget."
- (12) Whether Google "routinely" overdelivers ads to allow advertisers' accounts to go over their

1 daily budget.

2 (13) Whether Google “has a substantial financial interest in increasing the charges for AdWords
3 advertising.”

4 (14) The characterization of the FAQs as a “maze of more than 100 pages of information.”

5 (15) The specific amounts plaintiffs claim they were charged for advertising in their First
6 Amended Complaint.

7 **3. The Principal Legal Issues Which the Parties Dispute:**

8 **Plaintiffs’ Position**

9 The principal legal issues in dispute as to liability are whether Google’s conduct of
10 overdelivering ads, converting the daily budget set by an advertiser into a monthly budget and
11 charging advertisers up to said monthly amount irrespective of the number of days the ad ran during
12 the month, together with Google’s representations and its AdWords Agreement, constitutes a breach
13 of the AdWords Agreement, breach of the implied covenant of good faith and fair dealing, a
14 violation of California Business & Professional Code §§ 17200 *et seq.*, a violation of California
15 Business & Professional Code §§ 17500 *et seq.*, and/or unjust enrichment.

16 **Defendant’s Position**

17 The principal legal issues disputed by the parties are:

18 (1) Whether plaintiffs can satisfy the requirements for maintaining a class action. Specifically:

19 (a) Whether plaintiffs’ can satisfy the commonality requirement of FRCP Rule 23 by
20 demonstrating that a common nucleus of operative facts applies to the putative class, that relief will
21 turn on questions of law applicable in the same manner to each putative member of the class, and
22 that the alleged common issues of fact or law are of sufficient importance to the case that the Court
23 finds that a class action is the most efficient method of determining the rights of the parties.

24 (b) Whether plaintiffs can satisfy the typicality requirement by demonstrating that their
25 claims are typical of the claims of the putative class, that they possess the same interest and suffer
26 the same injury as the putative class members, and that their claims arise from the same event or
27 practice or course of conduct that gives rise to the claims of putative class members and are based on
28 the same legal theory.

1 (c) Whether the putative class is so numerous that joinder of all putative members
2 individually is impracticable, and whether class membership is objectively ascertainable.

3 (d) Whether plaintiffs are able meet their burden of demonstrating that they can fairly
4 and adequately protect the interests of all members in the putative class, that their attorneys are
5 qualified and competent, and that they do not have any interests antagonistic to the remainder of the
6 putative class.

7 (e) Whether plaintiffs can establish that a class action remedy is superior to individual
8 claims by demonstrating that the interests of putative members in individually controlling the action,
9 the extent and nature of any pending litigation commenced by or against the putative class involving
10 the same issues, the desirability or undesirability of concentrating the litigation of the claims in this
11 forum, the availability of alternative remedies, and the difficulties likely to be encountered if this
12 action were to proceed as a class lawsuit, all weight in favor of a class action proceeding.

13 (2) Whether plaintiffs have standing to bring the claims asserted.

14 (3) Whether Google is entitled under the express terms of the agreement with advertisers to
15 overdeliver ads in excess of an advertiser's daily budget on any single day.

16 (4) Whether Google is entitled under the express terms of its agreement with advertisers to
17 calculate the daily budget on a 30 or 31 day basis.

18 (5) Whether there was a breach of contract.

19 (6) Whether there was a breach of the implied covenant of good faith and fair dealing.

20 (7) Whether Google violated unfair competition laws by overdelivering ads in excess of the
21 advertiser's daily budgets on any single day when Google's right to do this is fully disclosed in the
22 contract. [Cal. Bus. & Prof. Code §§ 17200 *et seq.*]

23 (8) Whether Google violated unfair competition laws by calculating advertiser's daily budgets
24 on a 30 or 31 day basis when Google's right to do this is fully disclosed in the contract. [Cal. Bus.
25 & Prof. Code §§ 17200 *et seq.*]

26 (9) Whether Google violated false advertising laws by overdelivering ads in excess of the
27 advertiser's daily budgets on any single day when Google's right to do this is fully disclosed in the
28 contract. [Cal. Bus. & Prof. Code §§ 17500 *et seq.*]

(10) Whether Google violated false advertising laws by calculating advertiser's daily budgets on a 30 or 31 day basis when Google's right to do this is fully disclosed in the contract. [Cal. Bus. & Prof. Code §§ 17500 *et seq.*]

(11) Whether plaintiffs may sustain an unjust enrichment cause of action without alleging the invalidity of their agreement with Google.

(12) Whether plaintiffs' claims are limited or precluded since the terms and conditions of their agreement with Google disclaims "all warranties, express or implied," precludes "liab[ility] for any consequential, special, indirect, exemplary, punitive, or other damages whether in contract, tort or any other legal theory," and limits each party's aggregate liability "to amounts paid or payable to Google by [the advertiser] for the ad giving rise to the claim."

4. The Other Factual Issues Which Remain Unresolved:

Plaintiffs' Position

There are no other significant unresolved factual issues at this time as to liability.

Defendant's Position

Other factual issues, such as service of process, personal jurisdiction, subject matter jurisdiction or venue, are not at issue.

5. The Parties Which Have Not Been Served And The Reasons:

All parties have been served.

6. The Additional Parties Which The Parties Intend To Join:

Defendant has no present intention to join additional parties. Plaintiffs may add additional plaintiffs.

7. The Following Parties Consent To Assignment Of This Case To A United States Magistrate Judge For [Court or Jury] Trial

No party consents to assignment of this case to a Magistrate Judge for trial.

ALTERNATIVE DISPUTE RESOLUTION

8. The Notice Of Need For ADR Phone Conference

On March 9, 2006, the parties filed a Notice of Need for ADR Phone Conference. A phone conference is scheduled for March 29, 2006 at 10:30 a.m.

DISCLOSURES

9. The Parties Certify That They Have Made The Following Disclosures

The parties have agreed to exchange initial disclosures pursuant to FRCP 26(a) on March 29, 2006.

DISCOVERY

10. The Parties Agree To The Following Discovery Plan

See Joint Fed. R. Civ.P. 26(f) Report below.

PLAINTIFF'S POSITION REGARDING CLASS ISSUES

11. The Specific Paragraphs Of FRCP 23 Under Which The Action Is Maintainable As A Class Action

Plaintiffs' Position

Plaintiffs request both injunctive relief and damages, so that class certification is proper under both Rule 23(b)(2) and Rule 23(b)(3).

Defendant's Position

Defendant contends that class certification is not proper under Rule 23(b)(3), since the questions of law or fact common to the members of the class do not predominate over any questions affecting only individual members. Also, it is questionable whether plaintiffs have standing. The difficulties that would arise from individual factual and legal issues would outweigh any benefits from the management of this case as a class action.

12. A Description Of The Class Or Classes In Whose Behalf The Action Is Brought

Plaintiffs seek certification of a plaintiff class defined in the First Amended Complaint as "all persons who were charged by Google more than their set daily budgets for their advertising campaign(s)."

13. Facts Showing That Plaintiff Is Entitled To Maintain This Action Under FRCP 23(a) And (b)

a. Numerosity.

Plaintiffs' Position

Plaintiffs maintain that thousands of advertisers have been affected by Google's conduct.

1 **Defendant's Position**

2 Defendant contends that it is premature to determine if the purported class is sufficiently
3 numerous.

4 **b. Commonality.**

5 **Plaintiffs' Position**

6 Plaintiffs maintain that the issues of fact and law with regard to Google's representations in
7 connections with its AdWords program together with its conversion of a daily budget into a monthly
8 budget and overbilling and whether such conduct constitutes breach of contract, breach of the duty
9 of good faith and fair dealing, violation of California Business & Professional Code §§ 17200 *et*
10 *seq.*, a violation of California Business & Professional Code §§ 17500 *et seq.*, and/or unjust
11 enrichment, are common among all class members.

12 **Defendant's Position**

13 Defendant contends that commonality is not satisfied. A common nucleus of operative facts
14 does not apply to plaintiffs' defined class. Among other things, plaintiffs' class definition
15 overbroadly encompasses putative class members who may have paused their advertising
16 campaigns, and those who may not have paused. In addition, putative class members may have
17 received an "overdelivery credit" on their billing statement. The class definition also does not
18 specify a time period; thus, inconsistent legal issues may apply since some members of the putative
19 class may be barred by the statute of limitations or may have advertised under a different version of
20 the AdWords program.

21 **c. Typicality.**

22 **Plaintiffs' Position**

23 Plaintiffs maintain that their claims with regard to Google's conduct are the same as
24 the claims of other class members.

25 **Defendant's Position**

26 Defendant contends that typicality is not satisfied for the same reasons that the commonality
27 requirement is not satisfied. Among other things, plaintiffs' class definition overbroadly
28 encompasses putative class members who may have paused their advertising campaigns, and those

1 who may not have paused. In addition, putative class members may have received an “overdelivery
2 credit” on their billing statement. The class definition also does not specify a time period; thus,
3 inconsistent legal issues may apply since some members of the putative class may be barred by the
4 statute of limitations or may have advertised under a different version of the AdWords program.

5 **d. Adequacy.**

6 **Plaintiffs’ Position**

7 Plaintiffs allege in the complaint that plaintiffs have retained sophisticated, experienced
8 counsel and are dedicated to the successful resolution of this action.

9 **Defendant’s Position**

10 Defendant contends that it is premature to determine if this requirement is satisfied and that
11 the burden is on plaintiffs to demonstrate adequacy.

12 **e. Superiority.**

13 **Plaintiffs’ Position**

14 Plaintiffs maintain that a class action is the superior method to adjudicate common issues.
15 Absent a class action, each individual advertiser would have to litigate the same issues, namely,
16 whether Google’s conduct constituted the aforementioned legal claims, against Google, an
17 extremely well-financed company. The cost of such litigation by each individual advertisers is
18 likely to exceed their individual recovery.

19 **Defendant’s Position**

20 Defendant contends a class action is not superior to individual suits because questions of law
21 and fact common to the members of the class do not predominate over questions affecting only
22 individual members. As stated in the sections above, some class members may not have paused
23 their campaigns, may have received overdelivery credits, may have claims that are barred by the
24 statute of limitations, or may have advertised under a different version of the AdWords program.
25 The difficulties that would arise from individual factual and legal issues would outweigh any
26 benefits from the management of this case as a class action.

1 **14. A Proposed Date for the Court to Consider Whether the Case Can Be Maintained as a**
2 **Class Action.**

3 **Plaintiffs' Position**

4 Plaintiffs believe that it is premature to set an exact date by which to file a motion for class
5 certification because some discovery is necessary. Plaintiffs do intend to move for certification as
6 soon as practicable.

7 **Defendant's Position**

8 Defendant agrees that it is premature to set a date for the filing of a motion for class
9 certification and that discovery is necessary.

10 **TRIAL SCHEDULE**

11 **15. The Parties Request A Trial Date As Follows**

12 The parties agree that it is premature to estimate a date for trial at this time.

13 **16. Length Of Trial**

14 The parties agree that it is premature to estimate the length of trial at this time.
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOINT FED. R. CIV. P. 26(f) REPORT

Counsel for the parties have consulted as required by Federal Rule of Civil Procedure ("Fed.R. Civ. P.") 26(f), and the parties hereby submit this Joint Report as to all agreements reached regarding the matters set forth in Fed. R. Civ. P. 26(f), and a brief description of the positions of each party on those matters on which they disagree. At the same time as this Report, the parties hereby submit the [Proposed] Case Management Order.

1. Timing, Form Or Requirement For Rule 26(a) Disclosures.

The parties agree that no changes to the form or requirements of the Rule 26(a) disclosures are necessary. The parties will exchange their Rule 26(a) disclosures on or before March 29, 2006.

2. Subjects For Discovery, Scheduling Of Discovery, Phases Of Discovery, And Focus Of Discovery

(a) Subjects For Discovery.

Plaintiffs' Position.

Plaintiffs assert claims for breach of contract, breach of the implied covenant of good faith and fair dealing, a violation of California Business & Professional Code §§ 17200 *et seq.*, a violation of California Business & Professional Code §§ 17500 *et seq.*, and unjust enrichment. Plaintiffs seek damages and equitable relief, including reimbursement of amounts charged by Google in excess of advertisers' daily budgets, and enjoining Google from continuing to charge more than advertisers' daily budgets, costs and expenses of litigation, including attorneys' fees, and all additional and further relief that may be available.

While Plaintiffs contend that the material facts as to liability should not be in dispute, absent cooperation by Google, they anticipate having to conduct discovery concerning Google's (non)compliance with the above stated law, as well as to class issues including the number of Google's customers who have been affected by Google's violations of the above stated laws, as well as of the amount of damages, and (absent Google's cooperation), to Google's practice of converting daily budgets into monthly budgets and its representations and offers concerning the daily budget, advertisers' rights to control their own advertising costs and the right to pause their ads.

Defendant's Position

Defendant contends that before plaintiffs' class certification motion is heard, discovery should be limited to certification issues and should not be permitted on merits issues. Thus, prior to the certification hearing, the parties' discovery should be limited to information pertaining to the numerosity, commonality, and typicality of plaintiffs' claims, and the adequacy of representation.

Following the certification hearing, discovery will be conducted on the following subjects:

1. Any and all charges incurred by plaintiffs from Google.
2. Any and all billing statements received by plaintiffs from Google.
3. Any and all overdelivery credits plaintiffs received from Google.
4. Any and all evidence of payments by plaintiffs to Google for advertising charges.
5. Any and all AdWords Terms or FAQs in plaintiffs' possession.
6. Any and all communications, written and oral, between plaintiffs and Google pertaining to the AdWords program.
7. Any and all changes plaintiffs made to the status of their advertising campaign (such as pausing/unpausing a campaign or changing the daily budget amount) and the reasons for such changes.

(b) Scheduling Of Discovery.**Plaintiffs' Position**

Plaintiffs propose that all non-expert discovery be completed by December 31, 2006, that Plaintiffs' experts reports be produced by January 31, 2007, Defendant's expert reports be produced by , March 1, 2007 and that expert discovery be completed by March 30, 2007.

Defendant's Position

Defendant contends that discovery should be limited to certification issues before plaintiffs' class certification motion is heard. Defendant proposes that class discovery be concluded by September 30, 2006, and if applicable, that the briefing and hearing schedule on plaintiff's class certification motion be set thereafter, with defendant's opposition due at least 45 days after the motion is filed. Defendant proposes that non-expert discovery on the merits be completed by March 31, 2007; plaintiff's expert reports be produced by May 1, 2007, defendant's expert reports be

1 produced by June 1, 2007, and that expert discovery be completed by July 1, 2007.

2 (c) **Whether Discovery Should Be Conducted In Phases Or**
 3 **Limited To Particular Issues.**

4 **Plaintiffs' Position**

5 Plaintiffs contend that bifurcation of discovery or limiting it to specific issues will not serve
 6 the purposes of judicial efficiency and economy and will defeat same. In this consumer litigation,
 7 discovery related to class certification necessarily overlaps substantially with "merits" discovery.
 8 For example, the facts needed to prove that Plaintiffs' claims are typical of those of the members of
 9 the class and that there are common issues of fact and law alleged in the Complaint are also relevant
 10 to the merits. Any attempt to separate these material facts and pigeon-hole them into a "class
 11 certification" box or a "merits" box will give rise to delay, wasted judicial resources and higher
 12 litigation expenses.

13 **Defendant's Position**

14 Defendant contends that discovery should be conducted in two phases – one for issues
 15 limited to class certification, and a second for the merits of plaintiffs' claims. Prior to the
 16 certification hearing, the parties' discovery should be limited to information pertaining to the
 17 numerosity, commonality, and typicality of plaintiffs' claims, and the adequacy of representation.
 18 After the court has ruled on certification, the parties should be permitted to conduct discovery on the
 19 merits.

20 **3. Changes Made In The Limitations On Discovery Imposed By Rules.**

21 **Plaintiffs' Position**

22 Plaintiffs believe that the limitations on discovery imposed under the Federal Rules or Local
 23 Rules may be inappropriate to this complex class action. Although Plaintiffs contend that the
 24 material issues of fact are not in dispute, Defendant's litigation tactic may require Plaintiffs to take
 25 certain discovery that it not anticipated at this time. Whereas it appears that the ten (10) depositions
 26 may be sufficient, more than the allowable twenty-five (25) interrogatories are likely to be required.
 27 While Plaintiffs will make every possible effort to narrow discovery, they believe it is premature at
 28 this time to determine the appropriate number of depositions and their lengths and the number of

1 interrogatories.

2 **Defendant's Position**

3 Defendant contends that prior to the certification hearing, the parties' discovery should be
4 limited to certification issues. Defendant does not at this time request changes to the discovery
5 limits imposed by the Federal Rules.

6 **4. Other Orders That Should Be Entered.**

7 At this time, the parties anticipate requesting entry of a stipulated confidentiality order.
8 Plaintiffs also anticipate requesting entry of a non-destruct order.

9 **5. Motion Practice.**

10 Plaintiffs expect to file an early motion for summary disposition on liability, a non-destruct
11 order, possibly a motion to add additional plaintiffs, a motion for class certification, and if
12 appropriate, a motion for declaratory and injunctive relief during the pendency of merits discovery,
13 and if necessary, a motion for summary judgment after the completion of merits discovery.

14 Defendants expect to file an opposition to plaintiffs' class certification motion and a motion
15 for summary judgment after the completion of merits discovery.

16 **6. Scheduling Conference.**

17 The parties will appear before the Court on April 3, 2006, for the initial Scheduling
18 Conference in this matter.

19 DATED: March 23, 2006

20 **ALEXANDER, HAWES & AUDET, LLP**

21 By: /s/

22 William M. Audet (SBN 117456)
23 Jason T. Baker (SBN 212380)
24 152 North Third Street, Suite 600
25 San Jose, CA 95112
26 Telephone: 408.289.1776
27 Facsimile: 408.287.1776

28 **WOLF POPPER LLP**

Lester L. Levy
Michele F. Raphael
845 Third Avenue
New York, NY 10022

Telephone: 212.759.4600
Facsimile: 212.486.2093

Attorneys for Plaintiffs

DATED: March 23, 2006

PERKINS COIE

By: /s/
David T. Biderman
Judith B. Gitterman
M. Christopher Jhang
425 Market Street
San Francisco, CA 94105
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for Defendant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CLRB HANSON INDUSTRIES LLC d/b/a
INDUSTRIAL PRINTING, and HOWARD
STERN, on behalf of themselves and all
others similarly situated,

CASE NO: C05-03649 JW

Plaintiffs,

vs.

GOOGLE, INC.,

Defendant.

PLAINTIFFS' [PROPOSED] CASE MANAGEMENT ORDER

This Court, having conducted a Case Management Conference on April 3, 2006, hereby

Orders that:

- (1) The parties shall complete all non-expert discovery by _____;
- (2) Plaintiff shall produce their expert reports on or before _____;
- (3) Defendant shall produce its expert reports on or _____.
- (4) Expert discovery shall close on _____.

Dated:

United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CLRB HANSON INDUSTRIES LLC d/b/a
INDUSTRIAL PRINTING, and HOWARD
STERN, on behalf of themselves and all
others similarly situated,

CASE NO: C05-03649 JW

Plaintiffs,

vs.

GOOGLE, INC.,

Defendant.

DEFENDANT'S [PROPOSED] CASE MANAGEMENT ORDER

This Court, having conducted a Case Management Conference on April 3, 2006, hereby

Orders that:

- (1) The parties shall complete all class certification discovery by _____;
- (2) The parties shall complete all non-expert discovery by _____;
- (3) Plaintiff shall produce their expert reports on or before _____;
- (4) Defendant shall produce its expert reports on or _____.
- (5) Expert discovery shall close on _____.

Dated:

United States District Court Judge